SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 23 1961
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. ...513

JOHN F. McNEILL, Superintendent of Matteawan State Hospital,

Appellant,

v.

JOHN J. CARROLL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
80 Centre Street
New York 13, New York

PAXTON BLAIR
Solicitor General

ISADORE SIEGEL
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement of the case	5
The Questions are substantial	7
Conclusion	16
Appendix	
A. Opinion of the District Court	17
B. Opinion of the Court of Appeals	20

CASES

A.F.L. v. American Sash Co., 335 U. S. 538	12
Anderson Nat'l Bank v. Luckett, 321 U. S. 233	10
Bain Peanut Co. v. Pinson, 282 U. S. 499	11
Bourjois, Inc. v. Chapman, 301 U. S. 183	10
Bowles v. Willingham, 321 U. S. 503	10
Brown v. Board of Education, 347 U. S. 483	14
Bryant, In re, 214 La. 573, 38 So. 2d 245	9
Buck v. Bell, 274 U. S. 200	15
Cadieux, Matter of v. Macduff, 1 A. D. 2d 360, 150 N.Y.S. 2d 138, app. dism. 1 N. Y. 2d 827, 135 N. E. 2d 717	10
City of Chicago v. Atchison, Topeka & Santa Fe Ry., 357 U. S. 77	2
City of Detroit v. Murray Corp., 355 U. S. 489	2

PAGE

Coates, Application of, 9 N. Y. 2d 242, 173 N. E. 2d 797 7
Collins v. Texas, 223 U. S. 288 13
Columbus & Greenville Ry. v. Miller, 283 U. S. 96 ... 13
Connally v. General Construction Co., 269 U. S. 385 .. 16
Croswell's Petition, In re, 28 R. I. 137, 66 Atl. 55 10

Dowd v. Harmon, 229 Ind. 254, 96 N. E. 2d 902 8
Dowdell, In re, 169 Mass. 387, 47 N. E. 1033 9

Fox v. Washington, 236 U. S. 273 16

Goesaert v. Cleary, 335 U. S. 464 12

Hammon v. Hill, 228 Fed. 999 9
Hiatt v. Soucek, 240 Iowa 300, 36 N. W. 2d 432 9

Jeanpierre, Matter of v. Arbury, 4 N. Y. 2d 238, 149 N. E. 2d 882 9

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 .. 10

Marburg, Matter of v. Cole, 286 N. Y. 202, 36 N. E. 2d 113 9
McLaurin v. Oklahoma State Regents, 339 U. S. 637 .. 15
Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580 14
Miller v. Overholser, 206 F. 2d 415 8
Monamotor Oil Co. v. Johnson, 292 U. S. 86 13
Morey v. Doud, 354 U. S. 457 10

Nebbia v. New York, 291 U. S. 502 13
New York Rapid Transit Corp. v. City of New York, 303 U. S. 573 12

Patsone v. Pennsylvania, 232 U. S. 138 11
Payne v. Arkebauer, 190 Ark. 614, 80 S. W. 2d 76 9

PAGE

People ex rel. Brown v. Johnston, 9 N. Y. 2d 482, 174 N. E. 2d 725 9
People ex rel. Monaco v. McNeill, 299 N. Y. 605, 86 N. E. 2d 176 8
Poe v. Ullman, 367 U. S. 497 .....13, 14

Roschen v. Ward, 279 U. S. 337 12
Roth v. United States, 354 U. S. 476 16

Schwab, Matter of v. McElligott, 282 N. Y. 182, 26 N. E. 2d 10 9
Sweatt v. Painter, 339 U. S. 629 15

Tigner v. Texas, 310 U. S. 141 .....12, 14

Utah Power & Light Co v. Pfost, 286 U. S. 165 .....13, 16

West Coast Hotel Co. v. Parrish, 300 U. S. 379 12
Williamson v. Lee Optical Co., 348 U. S. 483 12

STATUTES

28 U.S.C. § 1254(2) 2
§ 2241 2
New York Civil Practice Act, Art. 78 9
New York Correction Law § 412 .....2, 6, 7, 9, 11, 12, 16
New York Mental Hygiene Law § 74 ..... 5, 7
§ 76 ..... 5, 7
§ 85 .....3, 7, 9, 11, 12, 14
Draft Act Governing Hospitalization of the Mentally Ill, Public Health Service Publication No. 5, at § 14 (1952) 8

TEXT

Lindman and McIntyre (ed.), The Mentally Disabled and the Law (1961) 9

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

JOHN F. McNEILL, Superintendent of Matteawan State Hospital,

Appellant,

v.

JOHN J. CARROLL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the Second Circuit, entered on July 26, 1961, holding New York State Correction Law § 412 uncontitutional, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the United States Court of Appeals, as yet unreported, is attached hereto as Appendix B. The unreported opinion of the United States District Court for the Southern District of New York, dated April 15, 1960, dismissing on the merits appellee's writ of habeas corpus after hearing, is attached hereto as Appendix A.

Jurisdiction

This proceeding was brought by appellee under 28 U.S.C. § 2241 in the United States District Court for the Southern District of New York to obtain a writ of habeas corpus. The District Court granted a hearing, and subsequently dismissed the writ on the merits on April 15, 1960. The United States Court of Appeals for the Second Circuit, on July 26, 1961, entered judgment reversing the District Court. Notice of appeal was filed in the United States Court of Appeals for the Second Circuit on August 24, 1961. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1254(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment: *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958); *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77 (1958).

Questions Presented

Does New York State Correction Law § 412, which gives the Commissioner of Mental Hygiene power to transfer, without a hearing, mental patients who were previously sentenced to imprisonment and who still manifest criminal tendencies, to Matteawan State Hospital from any other state hospital, violate the 14th Amendment of the United States Constitution?

Statutes Involved

New York Correction Law § 412.

"TRANSFERS FROM OTHER STATE HOSPITALS TO MATTEAWAN STATE HOSPITAL.

The commissioner of mental hygiene may, by order in writing, transfer to the Matteawan State Hospital any insane inmate of another state hospital, who was

held under any other than a civil process, committed thereto upon the order of a court of criminal jurisdiction or of a judge or justice of such a court; or any patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies, or any such patient who has previously been an inmate of the Matteawan state hospital.

Any inmate who has been transferred to the Matteawan state hospital pursuant to this section may thereafter again be transferred to any appropriate institution in the department of mental hygiene or the department of correction upon the order of the commissioner of mental hygiene and the consent of the head of the department having jurisdiction of the institution to which the inmate is to be transferred. The superintendent of Matteawan state hospital may discharge a patient who has recovered or who has improved so as to be no longer dangerous to himself or others. All persons committed to said Matteawan state hospital shall be a charge upon the state."

New York Mental Hygiene Law § 85:

"§ 85. PROCEEDINGS FOR CERTIFICATION TO MATTEAWAN STATE HOSPITAL OF CERTAIN DANGEROUS MENTALLY ILL PATIENTS OF STATE HOSPITALS IN THE DEPARTMENT.

1. The director of any state hospital, upon order of the commissioner, upon ascertaining that any person, duly certified to and a patient of such hospital as a mentally ill person, has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault, or is so dangerously mentally ill that his presence in such a hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community, shall forthwith make application to a court of record or judge thereof within the county

wherein such state hospital is located or a justice of the supreme court in the judicial district wherein such county is located for the appointment of a commission to determine the dangerous mental illness of such person, and the court may appoint a commission of not more than three disinterested persons to examine such person and report to the court as to his dangerous mental illness.

2. The court or judge thereof to whom such application is made, shall cause one copy of the verified petition for the appointment of a commission to be served upon the district attorney of the county wherein such state hospital is located in such manner as the court shall direct.

3. The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the civil practice act to be taken by referees. They may be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The person whose dangerous mental illness is being inquired into may be represented by counsel in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon.

4. If the commission find such person so dangerously mentally ill that his presence in a state hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community the court if in substantial agreement with the report and opinion of the commission must order that such person be admitted to the Matteawan state hospital, and direct the sheriff to take such person into his custody and deliver him to such Matteawan state hospital and be there confined pursuant to such order, and that upon his mental illness becoming no longer

dangerous to safety he may be released as provided in the correction law or he may be transferred to any other hospital in the department upon the order of the commissioner.

5. Certification to Matteawan state hospital pursuant to this section shall not be deemed as or received in any court in evidence of commission of a crime by the person so certified, nor shall such certification be deemed or considered a certification as punishment for a crime.

6. The costs necessarily incurred, under this section, in determining the dangerous mental illness of such person, including fees of the commission, fees of the medical witnesses, and any other necessary expenses allowed by the judge or justice, shall be a charge upon the county from which such person was originally certified; but in the city of New York, the judge or justice shall order such costs audited and allowed by the comptroller and paid by the treasurer of said city on the warrant of the comptroller from the court fund, and charged to the proper county within the said city."

Statement of the Case

Appellee John J. Carroll, pursuant to an order entered on January 7, 1949 by a state Supreme Court justice, was certified as mentally ill and admitted to Pilgrim State Hospital, an institution for the treatment of mental illness, for observation; thereafter, on February 11, 1949, the Associate Director of Pilgrim State Hospital certified that Carroll was in need of continued care and treatment, and the order became final. These proceedings, under New York Mental Hygiene Law §§ 74, 76, clearly fulfilled the requirements of due process of law; and appellee does not challenge their validity.

Appellee remained at Pilgrim State Hospital until December 21, 1949, when he escaped from the hospital after assaulting an attendant with an instrument of unknown description, and stealing his keys. The attendant suffered a compound skull fracture.

Prior to his admission to Pilgrim State Hospital, in 1934, appellee was convicted of robbery, second degree, and was sentenced to serve from two to four years in prison.

After appellee's escape, the Commissioner of Mental Hygiene reviewed appellee's hospital records and ordered that upon his return, he be transferred to Matteawan Hospital, designated by the state as the appropriate hospital to treat patients manifesting criminal tendencies. The order was executed on appellee's return, and he entered Matteawan Hospital on September 26, 1950. It is the validity of this order, made pursuant to New York Correction Law § 412, which is here attacked.

That statute provides that certain of the patients of state mental hospitals, including those previously sentenced to imprisonment, may be transferred to Matteawan Hospital if they still manifest criminal tendencies. A companion statute, Mental Hygiene Law § 85, provides for the transfer of the remaining categories of state mental patients where they are found to be dangerous to the safety of others; under the latter statute, a commission must examine the patient for dangerous mental illness; it is empowered to call witnesses and the patient is guaranteed right of counsel. The court then may issue an order based on the commission's findings.

Appellee's petition for habeas corpus was dismissed after hearing on the merits, on April 15, 1960, by the United States District Court for the Southern District of New York. The Court found that, aside from some additional security measures taken at Matteawan Hospital, the treatment accorded patients there and the record of cures effected there is the same as in the other state hospitals. It concluded that Matteawan is undoubtedly a hospital and

not a jail, and that the selection of Matteawan Hospital as the hospital appropriate for petitioner's treatment is a purely professional administrative matter for decision by the Commissioner of Mental Hygiene, not requiring notice and hearing.

On appeal, the United States Court of Appeals for the Second Circuit reversed, holding that Correction Law § 412 violated the equal protection clause of the United States Constitution. Although the Court refused to set aside the District Court's finding that Matteawan Hospital was a hospital and not a jail, it held that the equal protection clause required that appellee should have been accorded a hearing on his transfer from Pilgrim State Hospital to Matteawan State Hospital, since Mental Hygiene Law § 85 provided for a hearing in the case of other patients under civil process. The Court ordered that the patient be transferred back to Pilgrim State Hospital; efforts to stay that order were unsuccessful.

The Questions Are Substantial

(A)

The decision of the United States Court of Appeals, holding Correction Law § 412 unconstitutional, affects the status of fifty-seven patients currently at Matteawan State Hospital.

The statute involved represents an enlightened approach to the problem of hospitalizing the mentally ill. It is an integral part of the procedure for the care and rehabilitation of mental patients in New York State. Under that procedure, a patient may be committed for care upon a court order, adequate notice and an opportunity to seek review. Mental Hygiene Law §§ 74, 76. See *Application of Coates*, 9 N. Y. 2d 242, 173 N. E. 2d 797 (1961).* Appellee

---

* Jurisdictional statement filed in this Court, July, 1961, Docket No. 339 Misc.

concedes, as he must, that no fault can be found with this proceeding. Once a patient has been committed to a state mental hospital, if he manifests criminal tendencies he may be transferred, by written order of the Commissioner of Mental Hygiene, to Matteawan Hospital. It is obviously desirable to maintain a mental hospital devoted to those whose anti-social tendencies require special treatment, both to protect other members of the hospital community and to hasten the patient's adjustment to society. New York has done this and has recognized that the diagnosis and consequent order of transfer are purely matters of administrative, professional competence and hardly appropriate subjects for court proceedings. See *People ex rel. Monaco* v. *McNeill,* 299 N. Y. 605, 86 N. E. 2d 176 (1949). In doing so, it has abandoned ancient notions of mental illness and has treated it like any other disease; who would think of requiring a judicial hearing before transferring a patient from Orthopedics to Neurology? Yet, the Court of Appeals decision requires a hearing for transfers from Pilgrim State to Matteawan—while upholding a finding of fact by the District Court that Matteawan is a hospital whose record of treatment and cure is as good as other state hospitals (thereby distinguishing this case from *Miller* v. *Overholser,* 206 F. 2d 415 [D. C. Cir., 1953]; see *id.* at 419). It should be noted that the New York procedure has been upheld by the New York Court of Appeals, *People ex rel. Monaco* v. *McNeill, supra;* and a similar statute was upheld by the highest court of Indiana. *Dowd* v. *Harmon,* 229 Ind. 254, 96 N. E. 2d 902 (1951). The Draft Act governing hospitalization of the mentally ill, Public Health Service Publication No. 5, at § 14 (1952), sponsored by the Federal Security Agency—now the Department of Health, Education and Welfare—also takes the position that the transfer of a patient is purely a medical decision, and of the 34 states with provisions for transferring patients from one institution to another, only one requires a hearing on a transfer from one state mental

hospital to another. LINDMAN and MCINTYRE (ed.), *The Mentally Disabled and the Law*, pp. 179-82 (1961).

The Court of Appeals reasoned that because Mental Hygiene Law § 85 requires a hearing for transfer of certain patients to Matteawan Hospital, Correction Law § 412 must also provide a hearing for patients who have previously been sentenced for criminal offenses before they are transferred to Matteawan; absent such a provision, the statute violates the equal protection clause of the constitution. In sum, the court below held that because New York gives a hearing to patients without a criminal record —though not constitutionally required to do so—it must give hearings to all patients; or else, it must deny hearings to all. This holding, we maintain, conflicts with prior decisions of this Court, and raises serious questions relating to the scope of the equal protection clause.

First, the Court below fails to note that appellee is not deprived of resort to the courts. The determination of the Commissioner of Mental Hygiene that appellee manifests criminal tendencies is subject to court review; New York Civil Practice Act, Art. 78; *Matter of Jeanpierre* v. *Arbury*, 4 N. Y. 2d 238, 149 N. E. 2d 882 (1958); *Matter of Marburg* v. *Cole*, 286 N. Y. 202, 208, 36 N. E. 2d 113 (1941); *Matter of Schwab* v. *McElligott*, 282 N. Y. 182, 186, 26 N. E. 2d 10 (1940); it also appears that it is subject to collateral attack in habeas corpus proceedings; see *People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482, 174 N. E. 2d 725 (1961). The availability of such judicial remedies has been held to cure the lack of a hearing even at initial commitment proceedings; *a fortiori*, it should be the equivalent of a hearing when the only question involved is the transfer of a patient already validly committed. *Hammon* v. *Hill*, 228 Fed. 999 (W. D. Pa., 1915); *Payne* v. *Arkebauer*, 190 Ark. 614, 80 S. W. 2d 76 (1935); *Hiatt* v. *Soucek*, 240 Iowa 300, 36 N. W. 2d 432 (1949); *In re Bryant*, 214 La. 573, 38 So. 2d 245 (1948); *In re Dowdell*,

169 Mass. 387, 47 N. E. 1033 (1897); *Matter of Cadieux* v. *Macduff*, 1 A. D. 2d 360, 150 N.Y.S. 2d 138 (3rd Dept.), app. dism. 1 N. Y. 2d 827, 135 N. E. 2d 717 (1956); *In re Crosswell's Petition*, 28 R. I. 137, 66 Atl. 55 (1907). Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 519-521 (1944); *Anderson Nat'l Bank* v. *Luckett*, 321 U. S. 233, 246-247 (1944); *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189 (1937). Thus, the Court of Appeals' ruling must mean that New York cannot satisfy the equal protection clause by giving its mental patients with criminal records the *substantial equivalent* of the treatment accorded other mental patients; the two must be treated exactly alike.

The view of the court below stands in sharp contrast with the classic statement of this Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911), lately re-emphasized in *Morey* v. *Doud*, 354 U. S. 457, 463-464 (1957):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal protection clause of the Fifth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

What else but "mathematical nicety" is required here by the opinion of the court below? Must all the same formalities—the appointment of a commission, the issuing of a court order—attend Correction Law § 412 as attend Mental Hygiene Law § 85? Or is it rather more consistent with the spirit of this Court's decisions to view the rights given appellee as the substantial equivalent of rights given those without criminal records? On this score alone, the opinion below is open to serious question.

Second, even laying aside the procedural safeguards which give appellee the substantial equivalent of a hearing, the opinion below may be questioned in an even more fundamental respect—in its conclusion that it is arbitrary and unreasonable for New York to recognize that the presence of criminal tendencies in a mental patient is a subject for diagnosis, not adjudication, but nevertheless to provide a hearing before transferring to Matteawan patients without criminal records. Here again the Court of Appeals sharply departs from the existing law on the equal protection clause.

The guiding spirit of the decisions of this Court on the guarantee of equal protection was summed up by Mr. Justice Holmes' remark that "the interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints". *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501 (1931). Practicality, not abstractness or factious equality, has been the touchstone of the equal protection clause. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (1914). The legislature need not cover the entire gamut of its jurisdiction, but it may address itself to parts of the problem which seem most in

need of solution; even narrow distinctions may be justified. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *A.F.L.* v. *American Sash Co.*, 335 U. S. 538, 542 (1949); *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400 (1937).

Under the decisions of this Court, the equal protection clause would not prevent the New York Legislature from adopting both Correction Law § 412 and Mental Hygiene Law § 85. A hearing on the issue of "criminal tendencies" may be unnecessary, and, in fact, as we have stressed earlier, it is a throwback to the times when mental disease —especially when it involved a propensity towards violence —was regarded as something not susceptible to medical care. Nevertheless, the Legislature may choose to tread slowly—making the diagnosis a purely medical determination for the least sensitive category of patients, *i.e.* those who have a criminal record. That the Legislature has not gone as far as it might have is no warrant for invoking the equal protection clause. *Goesaert* v. *Cleary*, 335 U. S. 464, 467 (1948); *Roschen* v. *Ward*, 279 U. S. 337, 339 (1929). Otherwise, experimentation and improvisation—the great virtues of a Federal system—would come to a halt.

In *Tigner* v. *Texas*, 310 U. S. 141, 149 (1940), this Court, in upholding the exemption of farm combinations from criminal liability under the Texas antitrust laws, spoke of the problems involved in terms that accurately describe the prevailing problems in the hospitalization of mental patients in 1961:

> "Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out the old, familiar ones, the difficulties of proof within the conventional words of procedure, the effect of

shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still other considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law—enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise."

Here, too, public opinion must be educated; and, indeed, we still know far too little about mental health to make an "all or nothing" approach in legislation desirable. To make such an approach mandatory is stifling. The Court of Appeals for the Second Circuit, in decreeing an "all or nothing" standard, has turned the constitutional guarantee of equal protection into a strait-jacket. Its decision is contrary to the letter and spirit of the decisions of this Court —which has more than once remonstrated against such intolerance of change.

(B)

It is fundamental that a litigant can question a statute's validity only when he is able to show that he is harmed by its application. *Poe* v. *Ullman*, 367 U. S. 497, 504-05 (1961); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 96 (1934); *Nebbia* v. *New York*, 291 U. S. 502, 521 (1934); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186 (1932); *Columbus & Greenville Ry.* v. *Miller*, 283 U. S. 96, 100 (1931); *Collins* v. *Texas*, 223 U. S. 288, 295 (1912).

The record here was bare of any such evidence. The District Court found as a fact that Matteawan was a hospital with a level of treatment and a record of cures similar to that of Pilgrim State; and the Court of Appeals acquiesced in that finding. To be sure, the District Court also found that Matteawan maintained greater surveillance over its patients than did Pilgrim State—but, even if this is a sufficient ground for appellee to claim injury, there is no finding that appellee himself would be subject to any greater surveillance at Matteawan than at Pilgrim. It is inferable that the opposite is true; in the light of appellee's previous escape from Pilgrim and his assault on an attendant there, it is unlikely he would be any more at liberty there than at Matteawan. In any case, the burden of showing injury was on appellee, *Poe* v. *Ullman, supra,* at p. 505; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584 (1935), and he has failed to sustain that burden.

The opinion below meets this problem in a fashion that raises serious questions as to the scope of the equal protection clause. It reasons that, since Mental Hygiene Law § 85 provides for a hearing on transfer to Matteawan for some patients, there must be some disadvantages accruing to patients of that hospital. In brief, the court reasons that any difference in treatment between two classes *per se* implies some injury to the one and advantage to the other. In this particular case, the point may rather obviously be put that the legislature is not always influenced by considerations of abstract reason, and many elements other than a feeling that patients are disadvantaged by having been transferred to Matteawan may explain the existence of Mental Hygiene Law § 85; see *Tigner* v. *Texas, supra,* at p. 149. As to the general principle of *per se* injury, it should be noted that this Court has taken great pains to point out in each case before it under the equal protection clause why the difference in treatment operated unfairly upon one of the litigants. See, *e.g. Brown* v. *Board of*

Education, 347 U. S. 483, 493-95 (1954); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950); *Sweatt* v. *Painter*, 339 U. S. 629 (1950). The Court of Appeals opinion suggests that this recital was an idle ritual, thus reading that requirement out of the equal protection clause, contrary to the basic concepts of "standing" and equal protection, as set by this Court.

(C)

Appellee also attacked the constitutionality of Correction Law § 412 on various due process grounds. These arguments, passed over by the Court of Appeals and rejected by the District Court, are of little moment in determining whether this appeal presents a substantial question of public importance. It is sufficient to note that they add no strength to appellee's case, but rather bear out Mr. Justice Holmes' observation that the equal protection clause "is the usual last resort of constitutional arguments * * *" *Buck* v. *Bell*, 274 U. S. 200, 208 (1927).

Even if one is willing to ignore the requirement that appellee show some injury—made explicit in the due process clause as deprivation of "life, liberty, or property"—his contentions nevertheless fail.

As is pointed out at the beginning of this section, there is clearly no need for a hearing on transfer proceedings, where the original commitment to a mental hospital meets the requirements of due process; even if a hearing were required, the provisions for judicial review meet that requirement; appellee in effect is contending that 33 of the 34 states providing for transfers violate the constitution and that they are followed in their error by the United States Government in its proposed Draft Act for hospitalization of the mentally ill.

His contention that the standard for transfer—that the patient manifest "criminal tendencies"—is unconstitutionally vague is likewise frivolous. First, the "vagueness"

doctrine assures that persons will be sufficiently apprised of prohibited conduct so as to avoid *criminal* liability, *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); it thus has no application to standards of medical diagnosis. Second, "the Constitution does not require impossible standards"; it is no objection that marginal cases may be difficult to decide under the statutory standard. *Roth* v. *United States*, 354 U. S. 476, 491 (1957). Third, the definition of "criminal tendencies" is narrowed in the statute itself in the next-to-last sentence, providing for discharge when the patient is "no longer dangerous to himself or others"; in the absence of construction by the New York courts, the statute should be read so as to save its constitutionality. *Utah Power & Light Co.* v. *Pfost*, *supra*, at page 186; *Fox* v. *Washington*, 236 U. S. 273, 277 (1915).

CONCLUSION

It is submitted that New York Correction Law § 412 is constitutional, and that it authorizes the transfer of appellee to the Matteawan State Hospital. We submit that the questions raised by this appeal are substantial and that they are of public importance. Probable jurisdiction should be noted.

Dated: New York, New York, October 18, 1961.

Respectfully submitted,

Louis J. Lefkowitz,
Attorney General of the State of New York,
Attorney for Defendant-Appellant,
80 Centre Street,
New York 13, N. Y.

Paxton Blair,
Solicitor General.

Isadore Siegel,
Assistant Attorney General.
of Counsel.

APPENDIX A.

Opinion.

UNITED STATES DISTRICT COURT

FINDINGS OF FACT.

1. Petitioner in 1934 was sentenced to serve from two to four years in Great Meadows Prison and Sing Sing Prison on his conviction of the crime of robbery, second degree. He served his sentence.

2. Petitioner was committed to Pilgrim State Hospital on January 7, 1949, pursuant to an order of certification of a Justice of the State Supreme Court, dated January 4, 1949, and made under § 74 of the New York State Mental Hygiene Law. The Judge's order provided that the order become final upon the filing in the Office of the Kings County Clerk prior to the expiration of sixty days from its date, of the certificate of the Director or physician in charge or the designated medical officer of the institution, that the mentally ill person was in need of continued care and treatment. Such a certificate, made by Dr. Brill, Associate Director of Pilgrim State Hospital, was duly made and filed on February 11, 1949 in the Office of the Kings County Clerk. The propriety or legality of petitioner's commitment under this order is not challenged.

3. On December 21, 1949 petitioner escaped from Pilgrim State Hospital. It was said that in the course of his escape he inflicted a compound fracture of the skull on an attendant and stole the attendant's keys. Two days later, on December 23, 1949, petitioner was placed on escape status. No charge of a criminal nature based on the escape or the facts attending it has ever been filed.

4. On September 25, 1959 petitioner was arrested by a City detective at his wife's home on a warrant issued on her complaint that he was intoxicated, assaultive and uncooperative. From the precinct station house he was taken to Bellevue Hospital and then returned to Pilgrim State Hospital. On December 22, 1949, after his escape, the Senior Director of Pilgrim State Hospital had sent a letter to the Commissioner of Department of Hygiene, requesting transfer of the petitioner to Matteawan. Attached to this letter was a copy of the clinical summary giving the essential details of the petitioner's life before and during his stay at Pilgrim State Hospital. Petitioner's illness was diagnosed as dementia praecox paranoid type. The contents of this letter and of the clinical summary were conveyed to the Department of Correction which in turn communicated them to the Superintendent of Matteawan State Hospital, a qualified psychiatrist. He recommended the transfer of the petitioner to Matteawan and a written order to that effect was issued by the Commissioner of the Department of Hygiene on January 4, 1950 in accordance with the terms of § 412 of the Correction Law of the State of New York. Petitioner does not assert that the order was capricious or arbitrary. This order was executed on the day following his redelivery to Pilgrim State Hospital, September 26, 1950.

5. At Matteawan State Hospital the freedom of the patient is considerably curtailed. The patient is confined to the building or exercise yard; visiting hours are fewer; his correspondence to and from the hospital is examined and outgoing communications, other than to his attorney, are limited to one each week. Surveillance is continuous and effected by the presence of relatively numerous attendants—one to three patients. No patient is allowed out overnight or for weekends as they may be in the other State Mental Hospitals. In all other respects the treat-

ment accorded at Matteawan is precisely that accorded the patients in other State Hospitals and the record of cures effected is substantially like the record in the other State Hospitals. The Matteawan Hospital is a security institution but it is undoubtedly a hospital and not a jail.

CONCLUSIONS OF LAW

1. This petitioner is being confined because he is an insane person.

2. The selection of Matteawan Hospital as the hospital appropriate for the treatment of a person with a criminal record who is found to manifest criminal tendencies after commitment is a purely professional administrative matter for decision by the State Mental Hygiene Commissioner and not for the Courts. The Court recognizes no reason why making such a decision should be subject to notice or hearing.

3. The petition is dismissed.

Dated: New York, N. Y.
April 15, 1960

/s/ JOHN W. CLANCY
United States District Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 304—October Term, 1960.

(Argued March 10, 1961 Decided July 26, 1961.)

Docket No. 26731

UNITED STATES OF AMERICA, *ex rel.* JOHN J. CARROLL,

Appellant-Petitioner,

—v.—

JOHN F. McNEILL, SUPT. OF MATTEAWAN STATE HOSPITAL,

Appellee-Respondent.

Before:

LUMBARD, *Chief Judge,*

MAGRUDER and WATERMAN, *Circuit Judges.*

Appellant applied to the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus on the ground that he is unconstitutionally detained in Matteawan State Hospital. The application was dismissed after hearing, Clancy, *J.* Reversed.

MELVIN L. WULF (Marvin M. Karpatkin, of counsel), New York City, *for appellant-petitioner.*

Appendix B.

LOUIS J. LEFKOWITZ, Atty. General of the State of New York (Isidore Siegal, Asst. Atty. General, of counsel), *for appellee-respondent.*

DAVID N. FIELDS, New York City, *for Amicus Curiae, Association for Improvement of Mental Health, Inc.*

WATERMAN, *Circuit Judge*:

From September 26, 1950 to date the appellant, John Carroll, has been held in custody in Matteawan State Hospital (Matteawan), a New York State "hospital for insane criminals"[1] located within the Southern District of New York.

---

[1] Sections of the New York statutes having specific reference to Matteawan are §§ 400-414, comprised within Article 16 of Chapter 43 of the Consolidated Laws. Chapter 43, denominated the "Correction Law," became law in 1929 and was a general amendment of New York's former "Prison Law." The title of the 1929 Act was:

AN ACT in relation to the correction and detention of persons in state correctional institutions, constituting chapter forty-three of the consolidated laws.

The first section within Article 16, § 400 as amended, reads as follows:

ARTICLE 16—MATTEAWAN STATE HOSPITAL

§ 400. Establishment and purpose of the Matteawan state state hospital

The grounds, buildings and property located at Beacon in the county of Dutchess, and used for the purpose of the hospital for insane criminals, shall continue to be known as the Matteawan state hospital, to be used for the purpose of holding in custody and caring for such insane persons held under any other than a civil process as may be committed to the said institution by courts of criminal jurisdiction, or transferred thereto by the commissioner of mental hygiene, and for such persons as may be committed thereto pursuant to the provisions of section eight-five of the mental hygiene law, and for

Appendix B.

Appellant applied to the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus. He alleged that his detention in Matteawan is depriving him of his liberty without due process of law and is denying him the equal protection of the laws, and that therefore his detention is in violation of the Fourteenth Amendment of the United States Constitution. The petition was dismissed and an application for leave to appeal *in forma pauperis* was denied. Application for permission to appeal was then made to us. We granted the leave and, without opinion, remanded the case to the district court for a hearing upon the merits. After the hearing held upon remand the petition was again dismissed. We issued a certificate of probable cause, and, pursuant to 28 U.S.C. § 2253, the within appeal was taken from that final order of dismissal.

In 1934 petitioner was convicted in the New York courts of the crime of robbery, second degree. He was sentenced to serve from two to four years in prison. He served his sentence and was discharged on March 17, 1938. Fifteen years after this conviction, on January 7, 1949, pursuant to an order of certification of a Justice of the New York State Supreme Court, issued under New York Mental

---

such convicted persons as may be declared insane while undergoing sentence of one year or less or for a misdemeanor at any of the various penal institutions of the state, and for all female convicts becoming insane while undergoing sentence. When a person is committed to the Matteawan state hospital under the provisions of section six hundred and sixty-two b, section eight hundred and seventy-two or section eight hundred and seventy-five of the code of criminal procedure; or section eighty-five of the mental hygiene law, a copy of the minutes of the proceedings instituted to determine his mental condition shall be furnished to said hospital. *The department of correction shall have the jurisdiction and control of such hospital;* but it shall be subject to visitation and inspection of the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene. (Emphasis ours.)

Appendix B.

Hygiene Law § 74, Chapter 27 of the Consolidated Laws,[2] appellant was committed to Pilgrim State Hospital (Pilgrim), one of several New York State hospitals existing for the care and treatment of the mentally ill of the state, an institution under the governance of the State Department of Mental Hygiene. Appellant does not challenge the propriety of this commitment order, or his continued detention thereafter at Pilgrim pursuant to a certificate of need of continued care and treatment, all as provided for in § 74. On December 21, 1949, appellant escaped from Pilgrim. The following day, December 22, 1949, the Senior Director of Pilgrim addressed a letter to the Commissioner of Mental Hygiene requesting that appellant be transferred to Matteawan pursuant to New York Correction Law § 412, which provides:

---

[2] Chapter 27 of the Consolidated Laws is denominated the "Mental Hygiene Law." Chapter 27 was a general amendment and compilation of the laws relating to the commitment, care and treatment of insane and mentally defective persons, became law in 1927, and the title of the 1927 Act was:

> AN ACT relating to the mentally ill, mental defectives and epileptics, constituting chapter twenty-seven of the consolidated laws.

The Mental Hygiene Law contains the provisions of law applying to the administration of state hospitals for the mentally ill, such as Pilgrim. Section 74, a lengthy eight-paragraph section, sets forth in great detail the process and the hearing required for commitment to state mental hospitals, such as Pilgrim. Paragraph 1, the basic paragraph, which we believe is desirable to set forth for the clarity of the opinion, reads as follows:

> 1. A person alleged to be mentally ill, and who is not in confinement on a criminal charge, may be certified to and confined in an institution for the care and treatment of the mentally ill, upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district in which the alleged mentally ill person resides or may be, upon a certificate made by two examining physicians, accompanied by a petition therefor, or upon such certificate and petition, and after a hearing as provided in this section.

Appendix B.

§ 412. Transfers from other state hospitals to Matteawan state hospital

The commissioner of mental hygiene may, by order in writing, transfer to the Matteawan state hospital any insane inmate of another state hospital, who was held under any other than a civil process, committed thereto upon the order of a court of criminal jurisdiction or of a judge or justice of such a court; *or any patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies*, or any such patient who has previously been an inmate of the Matteawan state hospital. (Emphasis ours.)

Any inmate who has been transferred to the Matteawan state hospital pursuant to this section may thereafter again be transferred to any appropriate institution in the department of mental hygiene or the department of correction upon the order of the commissioner of mental hygiene and the consent of the head of the department having jurisdiction of the institution to which the inmate is to be transferred. The superintendent of Matteawan state hospital may discharge a patient who has recovered or who has improved so as to be no longer dangerous to himself or others. All persons committed to said Matteawan state hospital shall be a charge upon the state.

The director's letter, to which a copy of appellant's clinical summary was attached, referred to appellant's prior conviction and prison record and contained a statement that in the course of his escape from Pilgrim appellant had assaulted and fractured the skull of a hospital attendant. The letter, therefore, classified appellant as one "who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests

criminal tendencies, * * *" On January 4, 1950, a written order was issued by the Department of Mental Hygiene authorizing the transfer of petitioner to Matteawan pursuant to § 412. Appellant was apprehended on September 23, 1950 and was returned to Pilgrim on September 25. The order of January 4 was then forthwith executed and on September 26, 1950 appellant was transferred to Matteawan where he has since remained.

Had it not been for petitioner's 1934 conviction for robbery, the only way in which petitioner could have been transferred to Matteawan in 1950 was pursuant to New York Mental Hygiene Law § 85, the relevant parts of which are set forth in full in the margin.[3]

---

[3] The relevant parts of Section 85 provide:

1. The director of any state hospital, upon order of the commissioner, upon ascertaining that any person, duly certified to and a patient of such hospital as a mentally ill person, has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault, or is so dangerously mentally ill that his presence in such a hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community, shall forthwith make application to a court of record or judge thereof within the county wherein such state hospital is located or a justice of the supreme court in the judicial district wherein such county is located for the appointment of a commission to determine the dangerous mental illness of such person, and the court may appoint a commission of not more than three disinterested persons to examine such person and report to the court as to his dangerous mental illness.

2. The court or judge thereof to whom such application is made, shall cause one copy of the verified petition for the appointment of a commission to be served upon the district attorney of the county wherein such state hospital is located in such manner as the court shall direct.

3. The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the civil practice act to be taken by referees. They may be attended by the district attorney of the county, and may

Appendix B.

Section 85 provides for detailed judicial proceedings leading to a court certification that the mentally ill patient is dangerous and that the safety of the institutional environment requires his transfer to Matteawan. It provides that a commission of three disinterested persons shall examine the patient and report findings to the court. The patient is entitled to be represented by counsel during the proceedings. However, under New York Correction Law § 412 these usual procedural safeguards are denied to a mentally ill patient who has been previously sentenced to a term of imprisonment in a correctional institution even though the determination that he is mentally ill is made after the completion of his criminal sentence. Such a patient, as appellant, may be transferred, summarily, without any hearing whatsoever, to Matteawan pursuant to § 412.

---

call and examine witnesses and compel their attendance. The person whose dangerous mental illness is being inquired into may be represented by counsel in the proceedings. When the commissioners have concluded their examination they must forthwith report the facts to the court with their opinion thereon.

4. If the commission find such person so dangerously mentally ill that his presence in a state hospital is dangerous to the safety of other patients therein, the officers or employees thereof, or to the community the court if in substantial agreement with the report and opinion of the commission must order that such person be admitted to the Matteawan state hospital, and direct the sheriff to take such person into his custody and deliver him to such Matteawan state hospital and be there confined pursuant to such order, and that upon his mental illness becoming no longer dangerous to safety he may be released as provided in the correction law or he may be transferred to any other hospital in the department upon the order of the commissioner.

5. Certification to Matteawan state hospital pursuant to this section shall not be deemed as or received in any court in evidence of commission of a crime by the person so certified, nor shall such certification be deemed or considered a certification as punshiment for a crime.

Appendix B.

We are of the opinion that the denial of a judicial transfer procedure arbitrarily discriminates against those patients who have fully served prior sentences for crimes and have subsequently been admitted by civil process to a state institution of the type of Pilgrim, and denies to this class of patients the equal protection of the laws guaranteed to them by the Fourteenth Amendment.

During the hearing before the district judge, and during the argument on appeal, counsel for petitioner made efforts to distinguish the purpose of the two institutions. He correctly pointed out that Matteawan is denominated as a "hospital for insane criminals" and that Matteawan expressly does not deal with mentally ill persons committed into state custody by civil process, with the exception of those transferred from other institutions pursuant to the New York Mental Hygiene Law § 85 and the New York Correction Law § 412. See New York Correction Law § 400, *supra, footnote 1.* Counsel attempted through witnesses to show that Matteawan partook more of the character of a jail than a hospital, and, among other claimed differences, sought to prove that the treatment accorded the mentally ill at Pilgrim was far superior to that offered at Matteawan. The state, however, introduced evidence which tended to prove that the treatment of the inmates at both institutions was similar, and that the only administrative difference between the two was the standard of security enforced at Matteawan. After weighing the evidence the district judge concluded that "Matteawan Hospital is a security institution but it is undoubtedly a hospital and not a jail." Although we may well have reached a contrary result if the original decision had been ours, we may not set aside this finding of fact based upon all the evidence, for the finding is not a "clearly erroneous" one, Fed. R. Civ. Proc. 52(a) (28 U.S.C.A.).

However, the issue as to whether Matteawan is a hospital or a jail is not dispositive of the constitutional issue

presented for our determination. The state argues that Matteawan is a hospital, and therefore is indistinguishable from any other mental hospital that is a part of the complex of New York state mental hospitals, and assuming, of course, that a patient initially has been legally committed, a transfer of that patient from one institution to another within that complex is merely an unreviewable administrative decision. But the statutes of the State of New York do not support the state's argument. As pointed out above, Matteawan, unlike Pilgrim and similar hospitals, is under the governance of the State Department of Correction and not the State Department of Hygiene, and is an institution existing for the purpose of caring for and having custody of insane criminals. It is of obvious importance in this connection to note that whereas no judicial procedures need be observed when a civilly committed patient is transferred from one state hospital for the mentally ill to another like hospital, New York has provided by a specific statute a specific detailed procedure to be followed when a civilly committed patient is transferred from one of these state hospitals to Matteawan. If Matteawan were no different from the other hospitals no such procedure would be necessary or prescribed. The conclusion is inescapable when one reads New York Correction Law §§ 400-414 in connection with New York Mental Hygiene Law § 85 that the State of New York has set Matteawan apart from the state mental hospitals administered by the Department of Mental Hygiene and that the distinctive purpose of Matteawan is to provide a maximum security institution to care for insane criminals and other mentally ill persons who are so dangerously insane that they pose a threat to the therapeutic community at the ordinary state mental hospitals. With the exception of those Section 412 transferees initially committed upon civil process to the care of the Department of Mental Hygiene, every patient legally at Matteawan is there pursuant to a

court order specifically directing his commitment to the custody of the Department of Correction, or to Matteawan. A court order is even required when it is sought to transfer to Matteawan an incarcerated criminal who has become insane or has been found to be so while serving an unexpired sentence in a state correctional institution. New York Correction Law § 408. See *People ex rel. Brown* v. *Johnston* (NYCA May 4, 1961). Only Section 412 transferees are denied hearings prior to confinment in Matteawan. Lacking such hearings transferees from ordinary mental hospitals have no opportunity to refute the charges upon which the Commi sioner of Hygiene seeks to justify his order so committing them. Consequently, it is clear that these transferees are being treated differently from other transferees similarly situated in that they are denied judicial hearings and to that extent are discriminated against.

A state may, of course, in the interest of effectuating its valid governmental policies, make reasonable classifications among its citizens whereby those in one class may be treated differently from those in another. *Walters* v. *City of St. Louis, Mo.*, 347 U. S. 231 (1954);[4] *Goesaert* v. *Cleary*, 335 U. S. 464 (1948);[5] *MacDougall* v. *Green*, 335 U. S. 281 (1948); *Kotch* v. *Board of River Port Pilot Commr's*, 330 U. S. 552 (1947); *Rapid Transit Corp.* v. *City of New*

---

[4] "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate relative to the difference in classification, as to be wholly arbitrary." *Walters* v. *City of St. Louis, Mo.*, 347 U. S. 231 at 237.

[5] "The Constitution in enjoining the equal protection of the laws upon states precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" *Goesaert* v. *Cleary*, 335 U. S. 464 at 466.

York, 303 U. S. 573 (1938); *Great Atl. & Pac. Tea Co.* v. *Grosjean*, 301 U. S. 412 (1937); *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580 (1935). However, in so doing, a state must guard against classifications which are so arbitrary that they are repugnant to the equal protection clause of the Fourteenth Amendment. *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). The State of New York has not attempted to justify its discrimination under Correction Law § 412 against ex-convicts. It is content to argue that the judicial hearing accorded the ex-convict at the initial civil commitment proceeding is the only judicial hearing that the Fourteenth Amendment requires.[6] However, patients

---

[6] The state relies upon *People ex rel. Monaco* v. *McNeill*, 299 N. Y. 605, 86 N. E. 2d 176 (1949), a memorandum decision of the New York Court of Appeals, affirming an order of a Justice of the Supreme Court.

From the State Reporter's account of the case 299 N. Y. 605, 606, set forth in full in the Attorney General's brief we are told that the following facts underlie this memorandum decision. In 1929, petitioner, one Monaco, had "received a sentence of three years in a State reformatory," a correctional institution under the governance of the Department of Correction. On May 9, 1931, before that sentence had expired, Monaco was judicially adjudged by a Justice of the New York Supreme Court to be mentally ill and was ordered committed for treatment to a state hospital administered by the Department of Mental Hygiene, Central Islip, from which institution he was later, in 1934, transferred without a hearing, under § 412, to Matteawan. From the brief it would appear that the court below which twelve years later adjudicated upon the habeas corpus petition held that this transfer of Monaco raised no constitutional questions. No copy of this opinion and order has ever been handed us, and no citation as to where such can be found in any official reports has been furnished us. This opinion, an opinion of the Supreme Court of Dutchess County, New York, wherein Monaco's application for a writ of habeas corpus was dismissed, does not appear in any available compilation of judicial opinions; but the Court of Appeals Reporter's account sets forth that Monaco claimed § 412 to be unconstitutional in that his transfer pursuant to it deprived him of

sought to be transferred under Mental Hygiene Law § 85 had been accorded initial judicial commitment hearings, and yet, in order to ascertain whether they are so dangerous that a transfer to the more secure institution of Matteawan is warranted, they are given second judicial hearings prior to being transferred there. The denial to ex-convicts of these second hearings wherein they may be confronted with the evidence demonstrating that they still manifest criminal tendencies and wherein they may put in evidence of contrary purport constitutes a discrimination against them that we are required to hold is an arbitrary one. We have attempted to find a possible reasonable basis for this discrimination and we find none. We find nothing to demonstrate that ex-convicts who, after expiration of their sentences, become mentally ill, are inherently

---

his liberty without due process of law. As we understand the *Monaco* case it is clearly distinguishable from the case before us both on its facts and as to the impact of the Fourteenth Amendment. There the patient at the time of his initial commitment to Central Islip was in a state reformatory serving a three year criminal sentence (or mayhap was physically out of the institution) under the governance of the Department of Correction. He was committed to Central Islip by a Justice of the Supreme Court, a court having general criminal jurisdiction, on just what process is not clear, before his criminal sentence had expired. His mental illness began while he was in the custody of the Department of Correction and, his insanity continuing, his return to the custody of that Department (if indeed he was not continued in the technical custody thereof while at Central Islip) raises no question comparable to that raised by Carroll in the case before us. Here, petitioner's mental illness originated after his criminal sentence had expired, indeed, eleven years thereafter, and he was not committed to Pilgrim State Hospital as a criminal but as any mentally ill person who had no criminal record is committed, under Mental Hygiene Law § 74. Moreover, the recent opinion of the New York Court of Appeals in *People ex rel. Brown* v. *Johnston, supra,* casts grave doubt upon whatever authority *People ex rel. Monaco* v. *McNeill* may be thought to have. In any event rights under the United States constitution are here at issue and as to them federal courts, though always instructed by the views of state courts, must discharge the final responsibility.

more dangerous than those mentally ill who are not ex-convicts. In fact there are many "criminal tendencies" that are in no way violent tendencies just as there are many convicts and ex-convicts whose crimes were non-violent crimes. Nor, even if such an ex-convict shoud become dangerously insane, does there appear to be any justification for more hastily transferring him to Matteawan after his commission of a dangerous act at an ordinary mental hospital than in transferring any other patient who has committed such an act at such a hospital but whose transfer is nevertheless delayed until after he shall have had a judicial hearing.

We conclude, therefore, that unless New York Correction Law § 412 can be read so that it requires that a hearing be granted to an ex-convict charged with criminal tendencies prior to his transfer by administrative order from an ordinary state mental hospital to Matteawan, we must hold that Section 412 is unconstitutional as applied to him. We cannot so read the section. Its plain language precludes us from reading into it the requirement that a hearing be held.

We express our gratitude to petitioner's counsel, who, appointed by the court below, has so ably advocated petitioner's cause.

We reverse the district court, grant the writ, and direct that the petitioner be discharged from Matteawan and returned to Pilgrim State Hospital, until the procedures set forth in New York Mental Hygiene Law § 85 shall have been followed.

Office Supreme Court, U.S.
FILED
DEC 4 1961
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. 513

JOHN F. McNEIL, Superintendent of Matteawan State Hospital,

Appellant,

—v.—

JOHN J. CARROLL,

Appellee.

MOTION TO DISMISS OR AFFIRM

MELVIN L. WULF
c/o American Civil Liberties Union,
156—5th Avenue,
New York 10, N. Y.

MARVIN MOSES KARPATKIN
660 Madison Avenue,
New York 21, N. Y.,
Counsel for Appellee.

INDEX

PAGE

Statement of Facts 1

Argument:

The Case Having Been Correctly Decided Below, it Merits No Further Review in This Court 3

A. The Statute Is Not a Product of Medical Enlightenment 3

B. The Availability of Habeas Corpus or Other Post-Confinement Remedies Do Not Repair the Injury Suffered by Transfer Under § 412 . 5

C. The Court Below Correctly Applied the Equal Protection Clause 6

D. Appellee's Transfer Inflicted Concrete and Substantial Injury Upon Him 7

E. The Holding Below That § 412 Offends the Equal Protection Clause Does Not Vitiate Appellee's Other Arguments 8

1. Section 412 Deprived Appellee of Procedural Due Process 10

2. Section 412 is Unconstitutionally Vague .. 10

Conclusion 13

Appendix 1a

Cases

Ashwander v. T. V. A., 297 U. S. 288 (1936) 9

Board of Public Welfare v. Myers, 224 Md. 246 (1961) 5

Brown v. Board of Education, 347 U. S. 483 (1959) . 6

Buck v. Bell, 274 U. S. 200 (1927) 9, 10

Cline v. Frick Dairy Co., 274 U. S. 445 (1927) 10

Fox v. Washington, 236 U. S. 273 (1915) 12

Greene v. McElroy, 360 U. S. 474 (1958) 10

PAGE

Hillburn v. St. Paul, M. & M. Ry. Co., 23 Mont. 229, 58 Pac. 551 (1889) 11
Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955) 10
People ex rel. Brown v. Johnston, 9 N. Y. 2d 482 (1961) 4
People ex rel. Monaco v. McNeil, 299 N. Y. 605 (1945) 4, 12
Roth v. U. S., 354 U. S. 476 (1957) 11
A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233 ..... 10, 11
Standard Chemicals & M. Corp. v. Waugh Chemical Corp., 231 N. Y. 851, 131 N. E. 566 (1921) 11
State ex rel. Hastin v. State Board of Canvassers, 159 Wisc. 216, 150 N. W. 542 (1915) 11
U. S. v. Carolene Products, 304 U. S. 144 7
Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932) 12
Western Lumber & Pole Co. v. City of Ogden, 23 Colo. App. 461, 130 Pac. 1027 (1913) 11

Constitution and Statutes

U. S. Constitution, Amendment 14 8
N. Y. Civil Practice Act, Art. 78 5
N. Y. Code of Criminal Procedure, § 870-875 ..... 1a
N. Y. Code of Criminal Procedure, § 662b 1a
N. Y. Correction Law, § 400 4
N. Y. Correction Law, § 408 ..... 2a
N. Y. Correction Law, § 412 ..... 2, 3, 4, 5, 6, 8, 9, 10
N. Y. Insanity Law, § 122 (2 N. Y. State Consolidated Laws, 1909) 3
N. Y. Mental Hygiene Law, § 85 ..... 6, 10

Texts

Carroll, Alice in Wonderland (N. Y. 1944) 5
Report of the American Bar Foundation on the Rights of the Mentally Ill, 1961 ..... 1a

Supreme Court of the United States

October Term, 1961

No. 513

JOHN F. MCNEIL, Superintendent of Matteawan State Hospital,

Appellant.

—v.—

JOHN J. CARROLL,

Appellee.

MOTION TO DISMISS OR AFFIRM

Statement of Facts[1]

Appellee, pursuant to an order entered under § 74 of the New York State Mental Hygiene Law on January 4, 1949, was certified as mentally ill and confined at Pilgrim State Hospital (R. 108-117). On December 21, 1949, appellee eloped from the hospital while still subject to the order of commitment (R. 133). On September 23, 1950, appellee was returned to the custody of the Department of Mental Hygiene and on September 25, 1950, he was received at Pilgrim State Hospital (R. 133).

On December 22, 1949, the day following appellee's elopement from Pilgrim State, the hospital's Director requested in writing that the Commissioner of the Department of Mental Hygiene order appellee, upon re-apprehension,

---

[1] "R" refers to the record on appeal in the court below. The opinion of the Court of Appeals for the Second Circuit is now reported at 294 F. 2d 117.

to be transferred to Matteawan State Hospital under the purported authority of Section 412 of the New York State Correction Law. Section 412 was invoked on the ground that an assault was allegedly committed upon a hospital attendant by the appellee immediately preceding his elopement (R. 138). The record is barren of any evidence relating to the alleged assault. In conjunction with the fact that he had served a term of imprisonment under a 1934 felony conviction (R. 122), his sole conviction, the Commissioner of Mental Hygiene, on January 4, 1950, granted the Director's request and ordered appellee's prospective transfer to Matteawan (R. 107).

On September 26, 1950, the day following his return to Pilgrim State, appellee was transferred to Matteawan (R. 134). He was continuously confined at Matteawan until October 1961 when he was re-transferred to Pilgrim State pursuant to the mandate of the court below, after denial of an application for a stay by appellant.

As shown by the following excerpts from his medical record, appellee has consistently denied commission of the assault which was the basis of his transfer to Matteawan.

(a) September 26, 1950 (R. 152).

> "Q. This employee you had the battle with, was he doing something to you? A. I was the best friend he had, used to bring him up things—he used to kick the poor patients, beat them up. He tried it with me and I didn't like it."

(b) October 24, 1950 (R. 155).

> "He denies any connection with the assault on an attendant at Pilgrim State Hospital. He admits eloping. He says he got the keys from a patient and he says he locked the door so no one else would escape after he left."

(c) March 7, 1951 (R. 158).

"Denies that he injured anyone in any other hospital."

(d) November 14, 1951 (R. 158).

"He denies absolutely that he made any attack on an attendant by the name of Weeks and he claims that this Weeks was a friend of his."

(e) April 6, 1953 (R. 164).

"* * *[H]e claims he was the one who was assaulted."

ARGUMENT

The Case Having Been Correctly Decided Below, it Merits No Further Review in This Court.

A. The Statute Is Not a Product of Medical Enlightenment.

Appellant's jurisdictional statement presents for the first time the novel argument that Section 412 is a product of enlightened treatment of the mentally ill. Although there have been several insignificant changes through various codifications, Section 412 is fundamentally the same as when it was first enacted in 1893.[2] It is one thing to say that the transfer of a patient within a hospital is a medical decision; it is another to say that the transfer from a hospital to a prison, is a medical decision. It is hardly a sign of enlightenment for a hospital director to be able, by a stroke of the pen, and without any check against error, bias or misjudgment, to cause a civil mental patient to be abruptly thrown in among insane criminals.

---

[2] See, *e.g.*, § 122 of Insanity Law, in 2 N. Y. State Consolidated Laws 1909, where virtually the identical statutory language is included under Article 4 entitled "Matteawan State Hospital for Insane Criminals."

It may well be enlightened practice to transfer a sick criminal prisoner from his prison cell to a prison hospital. And one would not quarrel, to use the terms of appellant's analogy, with a medical decision to move the prisoner-patient from the neurology ward to the orthopedic ward of the prison hospital to which he has been transferred. But there is a substantial and qualitative difference between an intra-mural transfer and an order transferring a patient in a civil hospital to a correctional institution as provided by Section 412.[3] It might even be argued that a transfer to Matteawan of a convicted criminal who becomes mentally ill while serving in a state penitentiary is an expression of enlightenment, but see *People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482 (1961), *infra*, note 4. However, the notion that a mentally ill person may be thrown in with convicted criminals is in fact reminiscent of precisely those "ancient notions of mental illness" which, appellant argues, New York has abandoned by this statute.[4] (Appellant's ref-

---

[3] Matteawan is under "the jurisdiction and control" of the Department of Correction. N. Y. Correction Law § 400.

[4] *People ex rel. Monaco* v. *McNeil*, 299 N. Y. 605 (1945), although cited by appellant as authority for the statute's constitutionality, can be given no weight at all in light of its analysis and express rejection by the court below in footnote 6 of its opinion. Furthermore, the recent New York Court of Appeals decision in *People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482 (1961), casts considerable doubt on the constitutionality of any kind of free-wheeling administrative shuffling of institutional inmates as if they were just so many units of fungible goods. As the New York Court of Appeals held:

> "* * * [I]t seems obvious that any *further* restrant *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly committed and placed under the jurisdiction of the Department of Correction * * * is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society." (Italics in original) At 485.

erence, at p. 8 of his jurisdictional statement, to the many States which permit transfers between hospitals without hearing is analyzed in the appendix to this motion.)

B. The Availability of Habeas Corpus or Other Post-Confinement Remedies Do Not Repair the Injury Suffered by Transfer Under § 412.

In two instances on page 9 of his jurisdictional statement, appellant gives an incomplete picture of the opinion below. First, there is attributed to the court below the observation that New York is not constitutionally required to give a hearing to mental patients without a criminal record before transferring them to Matteawan. This, of course, is the observation of the Attorney General of the State of New York, not that of the Second Circuit Court of Appeals. Second, it is stated that the court below "fails to note" that appellee was not deprived of resort to the courts. This is a disingenuous argument. It implies that there is no defect in a state procedure which arbitrarily confines an individual and deprives him of any quantum of liberty,[5] so long as the individual may subsequently challenge the confinement's legality by habeas corpus, or a review proceeding under Article 78 of the New York Civil Practice Act. But this stands on its head the entire tradition of our jurisprudence which requires that a person have his day in court *first*.[6]

---

[5] For further judicial gloss on the retained constitutional rights of persons incarcerated in state institutions, see *Board of Public Welfare* v. *Myers*, 224 Md. 246 (1961). The Supreme Court of Maryland held there that racial segregation of inmates of state training schools for delinquint minors violated the equal protection clause.

[6] "Let the jury consider their verdict", the King said * * *. "No, no", said the Queen. "Sentence first, verdict afterwards." Lewis Carroll, "Alice in Wonderland", contained in *The Lewis Carroll Book* (New York 1944), p. 109.

To transport an individual to a correctional institution where, as the District Court found, his freedom is "considerably curtailed," and to inform him that he may seek his freedom by habeas corpus (information of questionable value to an unschooled and indigent inmate) is not, as appellant claims, "the substantial equivalent" of proceeding under New York Mental Hygiene Law § 85. In the course of a Section 85 hearing it may very well have been proven that appellee did not in fact attack an attendant, as is claimed, and he would not then have been transferred to Matteawan. It is conceivable, of course, that appellee, after having been summarily transferred to Matteawan under Section 412, could, on habeas corpus, likewise persuade the Court of his innocence. But until he learned that habeas corpus was available, learned how to prepare a petition, learned how to file it, and finally was granted a hearing, he will have passed considerable time in the correctional institution where he should never have been in the first place.

C. The Court Below Correctly Applied the Equal Protection Clause.

Appellant cites the school segregation cases, *Brown* v. *Board of Education*, 347 U. S. 483, presumably to argue that the court below misapplied the equal protection clause. Appellant's argument seems to imply that there is no factual differentiation between Matteawan and Pilgrim State and therefore the Court could only have found that the equal protection clause was violated because of some inherent or *per se* differentiation. But this argument fails because the inequality in the case at bar is in fact established both from the evidence before the District Court, and the statute-directed differentiation spelled out by the opinion below.

Appellant's attack on the equal protection front has another fatal weakness. Every decision of this Court cited by appellant in that portion of Part (A) of its jurisdic-

tional statement which is addressed to the equal protection clause, involved one or another economic regulatory statute. But there is a well-established distinction, in the most profound constitutional sense, between the legislature's right to experiment rather broadly with economic regulations, and the severe limitations on its power to regulate personal liberties. *U. S.* v. *Carolene Products*, 304 U. S. 144, 152, n. 4.

D. Appellee's Transfer Inflicted Concrete and Substantial Injury Upon Him.

Section (B) of the jurisdictional statement asserts that appellee suffered no harm by being transferred to Matteawan and, therefore, there was no basis for applying the equal protection clause. To support this assertion, appellant says that at most, the District Court found only that appellee would be subject to greater surveillance at Matteawan. In fact, the District Court found:

> "At Matteawan State Hospital the freedom of the patient is considerably curtailed. The patient is confined to the building or exercise yard; visiting hours are fewer; his correspondence to and from the hospital is examined and outgoing communications, other than to his attorney, are limited to one each week. Surveillance is continuous and effected by the presence of relatively numerous attendants—one to three patients. No patient is allowed out overnight or for weekends as they may be in the other State Mental Hospitals".[7]

In addition, the Second Circuit did not reason that *any* difference in treatment between two classes *per se* implies some injury, for it did not fail to show that respondent would be harmed by the application of § 412. Indeed, appellant's position is completely refuted in the following passage of the opinion below:

> "The conclusion is inescapable when one reads New York Correction Law §§ 400-414 in connection with New York Mental Hygiene Law § 85 that the State

[7] Jurisdictional Statement, p. 18.

> of New York has set Matteawan apart from the state mental hospitals administered by the Department of Mental Hygiene and that the distinctive purpose of Matteawan is to provide a maximum security institution to care for insane criminals and other mentally ill persons who are so dangerously insane that they pose a threat to the therapeutic community at the ordinary state mental hospitals".[8]

Thus the Court found from the face of the statutes, that there were substantial differences, as a matter of law, between the way New York accommodated civil mental patients on the one hand, and insane criminals on the other. In this connection, it is significant also that appellee's attempts to introduce testimony for the purpose of demonstrating factual differences in the quality of medical treatment were thwarted by the District Court.[9]

E. The Holding Below That § 412 Offends the Equal Protection Clause Does Not Vitiate Appellee's Other Arguments.

Part C of appellant's jurisdictional statement implies that although the Court of Appeals might have made an improper ruling in appellee's favor in holding that the New York statute offends the equal protection clause, the Court nevertheless agreed with appellant that the other constitutional arguments raised below were of little moment. Appellee urged below, and urges again in this Court, that in addition to violating the equal protection clause, Section 412 of the New York Correction Law violates the 14th Amendment by depriving appellee of procedural due process and is so vague and uncertain that it further violates the due process clause.

---

[8] Jurisdictional Statement, p. 28.

[9] Transcript of hearing on District Court, pp. 25-26 (included in record on appeal.)

The Court of Appeals held the statute unconstitutional as a violation of the equal protection clause without discussing the other urged bases of constitutional infirmity. It can hardly be questioned that a holding of unconstitutionality on one ground, where several grounds are urged, does not create even the barest presumption that the Court found the other grounds untenable. Questions of constitutional law are not to be anticipated in advance of the necessity of deciding them, and no constitutional determination is properly made by a Court unless absolutely necessary to a decision of the case before it. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-347 (1936) (Brandeis, J., concurring opinion). Consequently, neither the opinion below, nor settled principles of constitutional law, offer any support to what is apparently the point of appellant's argument.

Appellant resorts to Mr. Justice Holmes' observation in *Buck* v. *Bell*, 274 U. S. 200, 208 (1927), that the equal protection clause "is the usual last resort of constitutional arguments * * *." By this, appellant apparently intends to dispose of the other arguments advanced by appellee below. But the equal protection argument was not a "last resort" by appellee and certainly not by the Court, which ruled the statute unconstitutional on grounds of equal protection without discussing any of the other grounds of unconstitutionality. In *Buck* v. *Bell*, *supra*, this Court held constitutional a Virginia statute authorizing compulsory sterilization of third generation imbeciles. Pointing out that there was an elaborate and careful statutory scheme providing for notice, hearing, counsel, judicial review and all of the incidents of due process—all of which are absent from § 412—Mr. Justice Holmes used the phrase quoted above to reject the argument that the Virginia statute violated the equal protection clause inasmuch as the sterilization would be applied only to imprisoned imbeciles—but not to imbeciles at large. Of course, appel-

lee's status and his argument is completely different. Applying the facts of this case to *Buck* v. *Bell*, there is no doubt but that this Court would have ruled otherwise if the Virginia statute provided that the procedure for notice, hearing and judicial review was totally eliminated for all imbeciles with any prior criminal record—that for ex-convict imbeciles, summary sterilization without hearing was constitutionally permissible.

1. *Section 412 Deprived Appellee of Procedural Due Process.*

Section 85 provides at least the minimum procedural safeguards which a prospective transferee must be accorded. He is granted a hearing before an impartial tribune, the right to counsel, the right to be heard, and the right to confront and cross-examine the witnesses against him.[10] These safeguards are entirely ignored by Section 412, allowing appellee to be transferred by administrative order on the basis of a charge he was not permitted to meet.

2. *Section 412 is Unconstitutionally Vague.*

The statement in appellant's jurisdictional statement, page 16, that the "vagueness" doctrine is confined to *criminal* liability is incorrect. This Court has expressly held to the contrary. *Cline* v. *Frick Dairy Company*, 274 U. S. 445, 463 (1927); *A. B. Small Company* v. *American Sugar Refining Company*, 267 U. S. 233, 239:

> "* * * [N]ot the criminal penalty * * * but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle. * * *"

---

[10] Cf. *Greene* v. *McElroy*, 360 U. S. 474, and *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955).

The vagueness doctrine is regularly applied by highest state courts in considering the constitutionality of statutory prohibitions and liabilities which are not criminal.[11] Chief Judge Cardozo, in *Standard Chemicals & M. Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 351, 131 N. E. 566 (1921), cited with approval by this Court in *A. B. Small Co.* v. *American Sugar Refining Co., supra*, said, in response to this very same argument:

> "* * * [I]t applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. * * * [I]ts consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty. The act * * * sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The arbitrium boni vivi, unrestrained and undirected, becomes the test of right and wrong. * * * Disobedience is impossible unless there is something to be obeyed."

Further, *Roth* v. *U. S.*, 354 U. S. 476, 491 (1957) does indeed state, as appellant asserts, that the difficulty of deciding marginal cases does not render a statute void for vagueness, but appellant omits to mention what is probably the most significant feature of the *Roth* case: in order to find constitutional the obscenity statutes there under attack, this Court found that, in fact, the courts below had utilized a certain and objective standard to define "obscene," an element entirely absent in this case. Certainly, a statute should be read so as to save its constitutionality and, as the court below states in is opinion, it affirmatively

---

[11] See *Hillburn* v. *St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551 (1899) (School tax statute); *State ex rel. Hustin* v. *State Board of Canvassers*, 159 Wisc. 216, 150 N. W. 542 (1915) (Election law); *Western Lumber & Pole Co.* v. *City of Ogden*, 23 Colo. App. 461, 130 Pac. 1027 (1913) (Mechanic's lien Act).

attempted to give the statute a reading consistent with constitutionality, but found itself unable to do so by its "plain language."[12]

Appellant claims finally that no finding of unconstitutionality should be made until the statute has been construed by the New York Courts. But, of course, the New York Court of Appeals did pass on § 412 in *People ex rel. Monaco* v. *McNeil, supra.* Moreover, as the court below stated:

> "In any event rights under the United States Constition are here at issue and as to them federal courts, though always instructed by the views of state courts, must discharge the final responsibility".[13]

The two cases cited by appellant on this point (p. 16) do not support its argument. In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186-187 (1932), the Court declined to rule on the constitutional question essentially because such a holding was unnecessary to decide the case. And in *Fox* v. *Washington*, 236 U. S. 273 (1915), rather than withhold interpretation of a statute out of deference to a state court, Mr. Justice Holmes articulated what he found to be the implied construction by the state court, and added something of his own by way of statutory construction "in accord with the usages of English". *Ibid.*

---

[12] Jurisdictional Statement, p. 32.

[13] Opinion below, footnote 6.

CONCLUSION

Because no substantial questions of public importance are presented which have not been finally and correctly determined by the United States Court of Appeals, its decision holding the statute unconstitutional should be affirmed by this Court, or the appeal should be dismissed.

Respectfully submitted,

MELVIN L. WULF,
c/o American Civil Liberties Union,
156—5th Avenue,
New York 10, N. Y.

MARVIN MOSES KARPATKIN,
660 Madison Avenue,
New York 21, N. Y.,
Counsel for Appellee.

Appendix

On page 8 of his jurisdictional statement, appellant says, "[O]f the 34 states with provisions for transferring patients from one institution to another, only one requires a hearing on a transfer from one state mental hospital to another. Lindman and McIntyre (ed.), *The Mentally Disabled and the Law*, pp. 179-82 (1961)."[1]

Appellant has been misled by the material he cites:

1. The compilation is obviously incomplete. For example, it cites neither N. Y. Mental Hygiene Law, § 85 nor N. Y. Correction Law, § 412.

2. The exclusion of § 85 and § 412, if not an inaccuracy, may indicate the study's limited scope, for it does not discuss criminal hospital facilities at all. Only nineteen states in addition to N. Y. have such special facilities:[2] Separate Ward at Colorado State Hospital. Col. Rev. Stat. § 71-2-1; Illinois Security Hospital. Ill. Ann. Stat. § 23-1441; Indiana Hospital for Insane Criminals. Ind. Stat. Ann. § 22-306; Psychiatric Ward of Men's Reformatory. Iowa Code Ann. § 226.30; Separate buildings on grounds of one state hospital. Gen. Stat. of Kans. § 76-2460;

---

[1] The volume cited is *The Report of the American Bar Foundation on the Rights of the Mentally Ill*. Appellant is in fact incorrect in stating that the Report lists only one state which requires a hearing prior to transfer. Two states have such a requirement: Conn. Gen. Stat. §§-17-192. Del. Code Ann. § 16-5324; and Arizona requires the consent of the patient, his parents, spouse or guardian. Ariz. Rev. Stat. § 36-501(8) (Supp. 1961).

[2] By far the greatest number of inmates of these special institutions are those charged with crimes but unable to stand trial because of mental illness (*e.g.*, N. Y. Code of Criminal Procedure, §§ 870-875) or those acquitted at trial because of insanity but deemed to require continued custody (see, *e.g.*, N. Y. Code of Criminal Procedure § 662b). For example, in fiscal 1959, of 291 admissions to Matteawan State Hospital, 198 fell into those two groups. All but 17 of the remainder consisted of prisoners at correctional institutions who became insane during service of their sentence. Annual Report of Matteawan State Hospital, 1959.

Maximum Security Hospital. Md. Code Ann., Art. 59 § 19A (Supp. 1960); Bridgewater State Hospital. Mass. Ann. Laws §§ 123-20, 123-22A; Ionia State Hospital. Mich. Comp. Laws § 14.855; Minnesota Security Hospital. Minn. Stat. § 253.20; Trenton State Hospital. N. J. Stat. Ann. § 30:4-87; Ohio Rev. Laws Ann. § 5125.03; Fairview State Hospital. Pa. Stat. Ann. Title 50, § 1140; Criminal Insane Ward at Cranston State Hospital. Gen. Laws of R. I., § 26-4-1 (1956); Branch of state hospital located on grounds of state penitentiary. Code of Laws of S. Car. § 32-899.10 (Supp. 1960); Maximum Security Unity. Tenn. Code Ann. § 33-701 (Supp. 1960); Department for Criminal Insane. Code of Va. § 37-2; Special ward in one of the state hospitals. Wash. Rev. Code § 10-76-060; Central State Hospital. Wis. Stat. § 51.21(2); Wyo. Stat. Ann. § 25-44.

Of the nineteen states listed above, three (possibly four), in addition to N. Y. Mental Hygiene Law, § 85, require a judicial hearing to transfer a patient or inmate of a civil institution to the special facility.[3]

Iowa. Iowa Code Ann. § 226.30.

Massachusetts. Mass. Ann. Laws §§ 123-20 and 123-22A.

Michigan. Op. Att. Gen. 1930-1932, p. 396.

Pennsylvania. Quaere. Compare Pa. Stat. Ann. § 1261 with § 1263.

Of the nineteen states listed above, the following appear to limit admission to the special facilities to persons convicted of or charged with a crime:

South Carolina. Code of Laws of S. Car. § 32-927.

Washington. Wash. Rev. Code § 10-76-060. Cf. § 71-02-480.

Wyoming. Wyo. Stat. Ann. § 25-44.

---

[3] Although time prevented tabulation, it appears that most—if not all—states require a court order to transfer an inmate of a prison to a mental institution, criminal or otherwise. See, *e.g.*, N. Y. Correction Law, § 408.

(1680)

Supreme Court of the United States

No. 513—October Term, 1961

JOHN F. McNEILL, Superintendent of Matteawan State Hospital,

Appellant,

v.

JOHN J. CARROLL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO VACATE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS AND REMAND THE CAUSE TO THE DISTRICT COURT WITH DIRECTIONS TO DISMISS THE CAUSE AS MOOT

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Appellant
80 Centre Street
New York 13, New York

PAXTON BLAIR
Solicitor General

JOSEPH J. ROSE
Assistant Attorney General
of Counsel

Supreme Court of the United States

No. 513—October Term, 1961

JOHN F. McNEILL, Superintendent of Matteawan State Hospital,

Appellant,

v.

JOHN J. CARROLL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO VACATE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS AND REMAND THE CAUSE TO THE DISTRICT COURT WITH DIRECTIONS TO DISMISS THE CAUSE AS MOOT

The appellant moves this Court for an order vacating the judgment of the United States Court of Appeals for the Second Circuit and remanding the cause to the United States District Court for the Southern District of New York with directions to dismiss the cause as moot.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Appellant
80 Centre Street
New York 13, New York

Dated: Albany, New York, February 5, 1962.

PAXTON BLAIR
Solicitor General

JOSEPH J. ROSE
Assistant Attorney General
of Counsel

SUPREME COURT OF THE UNITED STATES

No. 513—October Term, 1961

JOHN F. McNEILL, Superintendent of Matteawan State Hospital,

Appellant,

v.

JOHN J. CARROLL,

Appellee.

MOTION TO VACATE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS AND REMAND THE CAUSE TO THE DISTRICT COURT WITH DIRECTIONS TO DISMISS THE CAUSE AS MOOT

Statement in Support of Motion

On April 15, 1960, the United States District Court for the Southern District of New York, after a hearing, dismissed a petition by appellee for a writ of *habeas corpus*.

On July 26, 1961, the United States Court of Appeals for the Second Circuit reversed the District Court and directed that appellee be returned from the Matteawan State Hospital to the Pilgrim State Hospital.

Appellant filed a Notice of Appeal to this Court on August 24, 1961, and filed a Jurisdictional Statement on October 18, 1961.

On January 8, 1962, this Court noted probable jurisdiction. On January 24, 1962, the appellee died while at Pilgrim State Hospital and his counsel has now filed and

served a memorandum suggesting that the cause is moot and the appeal must be dismissed.

In *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (and cases therein cited), this Court stated: "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below with a direction to dismiss."

"When it is shown that a case brought from a lower federal court has become moot, the Supreme Court, under the present practice, usually reverses or vacates the judgment or decree and remands with directions to dismiss the bill, complaint or petition." *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, p. 499.

We respectfully urge, therefore, that the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the case remanded to the United States District Court for the Southern District of New York, with a direction to dismiss.

Dated: Albany, New York, February 5, 1962.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Counsel for Appellant

PAXTON BLAIR
Solicitor General

JOSEPH J. ROSE
Assistant Attorney General
of Counsel